IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 83 OF 2006.

Gowardhan Vasudeo Deshmukh
and others. ... Appellants.

Versus.

Uttam Vasudeo Deshmukh. ... Respondent.

Shri R.V.More for the Appellants.

Shri S.S.Patwardhan for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 3rd April, 2006.

P.C.:

1. Heard Shri More for the Appellants. The Appellants are the original Defendants. Defence of the Appellants was that during the lifetime of the father of the parties, there was a partition and on the basis of the said partition by metes and bounds, the parties were enjoying their separate shares.

2. The trial Court dismissed the suit by accepting the case made out by the Appellants. However, the Appellate Court has interfered and passed a decree for partition in favour of the Respondent.

3. Shri More appearing for the Appellant invited my attention to the findings recorded by the trial Court as well as the findings recorded by the Appellate Court and in particular in paragraph 19 of its judgment. He submitted that when the Appellate Court accepted the

case of the Appellants that Defendant No.2 has made a bore well and installed submersible pump in the land occupied by him and that there was no evidence on record to believe that bore well is dug jointly by the members of the family, the case of partition made out by the Appellants ought to have been accepted. He pointed out that the Appellate Court in the same paragraph has referred to the statement made by the Respondent in his evidence that he is not taking water from the said well. He, therefore, submitted that the Appellate court has in terms ought to have accepted the case of the Appellants.

4. I have considered the submissions. The Appellate Court has observed that going by the case of the Appellants in the written statement about partition effected during the life time of the father, the partition must have been effected about 18 to 19 years prior to the date. The Appellate Court observed that even going by the case of the Appellant that the partition was effected in the year 1985-86 which means four to five years prior to the death of the father. The Appellate Court observed that under the said partition it is not shown that the father was allotted any particular share. Considering this aspect of the matter, the Appellate Court has disbelieved the case of the Appellants regarding prior partition. The said finding of fact cannot be interfered in the Appeal under

section 100 of the Code of Civil Procedure, 1908.

5. The Appellate Court has found that the Defendant No.2 has dug a bore well and installed submersible pump on a part of land bearing Gat No.37. While effecting partition by metes and bounds, the concerned authorities will have to allot as far as it may be possible and practicable the relevant portion of the land on which bore well is made to the share of the Defendant No.2.

6. Subject to the observation made above, there is no merit in the Second Appeal and the same is dismissed with no order as to costs.

Judge.